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SUBJECT: PUBLIC DEBATE ON THE RESTITUTION LAW

REF: BELGRADE 774

SUMMARY

¶1. Serbia is the only country in Europe without a restitution law. A restitution law is a prerequisite for EU membership, but more importantly, it is vital to attracting badly needed foreign direct investment, establishing the right to private property, and revitalizing Serbia's market economy. The GOS finally decided to rectify a six-decade old injustice by drafting a law on restitution and soliciting feedback on it through public working consultations. However, the working consultations raised a number of questions which indicate the law will not be adopted in the near future and its implementation will be difficult. End Summary.

WORKING CONSULTATIONS ON RESTITUTION

¶2. On May 10 2007, the outgoing caretaker Serbian government "gave support" to a draft law on restitution (reftel), leaving the incoming government to approve it and send it to Parliament for adoption. The law was drafted by Milan Parivodic, current Advisor for Legal Issues to Prime Minister Kostunica and former Minister for International Economic Relations. Parivodic wrote the law with the assistance of recommendations from the Austrian, German and Swiss governments as part of a technical assistance program funded by the three countries at Serbia's request. The new Serbian administration made few changes to the original draft.

¶3. From October through December 2007, the Ministry of Finance organized five working consultations on the current draft law. The purpose of these consultations was to solicit feedback on the draft from legal and economic experts, restitution claimants, claimants' rights associations and from government institutions that will implement and enforce the law. A Ministerial Working Group, with representatives from various ministries, pledged to consider feedback from the working consultations in formulating the final draft, which later will be released for further public debate.

¶4. Slobodan Ilıc, State Secretary at the Ministry of Finance, said that once the law is approved by the government, but prior to Parliament adoption, it will be sent to experts in the Council of Europe to ensure it adheres to EU norms. Deputy Prime Minister Bozidar Djelic said that the GOS would send a set of related laws on property issues, including the law on restitution, urban construction land, and private and public property, to Parliament by the end of February 2008. However, this may not be realistic as these laws are still in the drafting stage and have not been approved by the government. Slobodan Ilıc said at the first round table in October that the law on restitution would most likely be adopted by the end of February 2008. At the last round table on December 25, however, Ilıc revised his expectation saying that the final draft law should be ready for government approval by the end of February 2008, but he did not want to predict when it would be adopted by the Parliament.

15. According to the draft, the law "shall regulate the conditions, the mode and the procedure of restoring property (restitution) in the territory of Serbia, which was seized after January 1, 1945," by the Tito communist regime "as well as property that was confiscated on the basis of racist regulations and acts of [German] occupation authorities after April 6, 1941" to their former owners. (Note: Though not explicit, the inclusion of properties seized after April 6, 1941 into the restitution draft is to address claims of the Serbian Jewish community. End Note.) In addition, the law "shall also regulate the restitution or privatization of city building land."

16. In general, the draft law calls for immediate restitution in kind (return of the original property to its original owner) when possible. If not possible, claimants would receive cash, capped at \$14,300 per person, and bond compensation. The bond compensation would be a 20-year bond that would begin payout two years after the law is adopted. The bonds will bear a 4.5 percent annual interest rate and mature in 2028. The bond would be capped at \$1.43 million per claimant and \$1.43 million per property. The government has stated that its total cash and bond payout will not exceed \$5.7 billion. Parivodic said though \$5.7 billion will be set aside for claims, he expects \$3.6 billion will be sufficient. The IMF office in Belgrade has expressed concern about the cost of financing these bonds.

FINE TUNING VS. ROUGH APPROXIMATION OF JUSTICE

17. Parivodic presented the draft law as a "reflection of the reality in Serbia and the result of hard compromises and political pragmatism" which is not a "fine-tuning of justice, but a rough

approximation of justice." He admitted that he is not satisfied with some aspects of the law, but believes the law will allow for the introduction of market economy principles in Serbia's real estate sector. In drafting the law, he said he focused on the principles of efficiency and macroeconomic stability and that sometimes these principles outweighed the principle of justice for original landowners. He also considered the good-faith-acquirer principle in which the person, who purchased property in conformity with the laws existing after nationalization, remains the owner of that property.

18. Under the current draft law, when immediate in-kind restitution is not possible, the disputed land would be returned to its original owner. The original landowner and those currently using the land would then enter into a landlord-tenant lease agreement. Parivodic believes a leasing relationship is a "logical continuity" of "right of use," and as such allows parties to reach an agreement without government intervention to set prices. State intervention, if necessary where agreements could not be reached, would be limited to 10 years, after which market mechanisms would take over.

19. The "right of use" describes the type of urban construction land ownership instituted during communism in the former Yugoslavia. It entitles building owners to use land for as long as they own the building or a maximum of 99 years. This right is acquired, transferred and terminated automatically with acquisition, transfer or termination of ownership of the building. During the communist era, tenants were only occupants of apartments, and never apartment owners. However, during the 90's, after the first democratic demonstrations against Milosevic's regime, Milosevic allowed tenants to buy their apartments, and become permanent owners, at the very low price of 100 Deutsch Marks (Germany currency was used because of Serbian hyper-inflation) in a bid to gain votes. However, this scheme only complicated the situation further, creating owners of apartments who are not the owners of the land under that apartment.

COMPETING PRINCIPLES

10. The principles underlying the provisions of the draft law were

criticized by all participants in the working consultations including from other government institutions and ministries that will implement and enforce the law. Claimants say the law is the "legalization of nationalization," because while it calls for in-kind restitution, in many cases it would protect those who acquired property after land was nationalized, leaving original landowners with bonds. Claimants suggest the proposed law will require state intervention since it does not include a defined dispute resolution mechanism for those cases in which a claimant cannot reach a lease agreement with land occupants.

¶11. The most disputed topic, however, is the restitution of urban construction land. At the working consultations, Professor Dragor Hiber and other experts from the think tank Center for Liberal Democratic Studies (CLDS) advocated the privatization of urban construction land and the application of the Roman principle "superficies solo cedit," which entitles the landowner to what lies above that land parcel (i.e. buildings). According to Hiber, this standard has been applied in restitution cases in the rest of Eastern Europe. However, to resolve the problem created under Milosevic of separate owners of the building and land, Professor Hiber advocated giving the land to the building owner and not the original landowner. Instead, the original landowner would receive financial compensation. A representative from the Austrian Development Agency, who advised the Serbian government on the draft, complained that the current draft does not follow the true principle "superficies solo cedit" and parts of the draft do not adhere to international standards.

¶12. Parivodic explained that "superficies solo cedit" is ideal, but it could not be implemented in every case because of "Serbia's chaotic situation after communism and Milosevic." According to Parivodic, the draft law will naturally follow the "superficies solo cedit" principle in 80 percent of the cases which will cost the government less because it will not have to compensate original landowners. Parivodic mentioned that, according to the Austrians, the value of the land for restitution is estimated between \$20 and 25 billion.

CLAIMANTS' ASSOCIATIONS WEIGH IN

¶13. In the working consultations, many claimants' rights associations voiced their opposition to bond compensation and financial limits. They said they would accept only in-kind restitution or property of equal value. Amcit Bogdan Veljkovic from the Restitution Network said that Serbia's S&P BB- bond credit rating should carry a 20 percent annual interest rate instead of 4.5 percent, otherwise owners would have to sell their bonds at a significant discount and would receive only 10 percent of their real value. Veljkovic also opposed the individual and property compensation caps. He was supported by the Serbian League representatives Amcit George Ilic and Branislav Trajkovic, The League for the Protection of Private Property representative Slavenko Grgurevic, and by The Association of Jewish Municipalities in Serbia. Both organizations support the idea of a Restitution Fund in which the government would give claimants parcels of premium, newly developed commercial and residential real estate.

MALA FIDE VS. GOOD FAITH DISPOSAL

¶14. There were many complaints from experts, as well as from government representatives, on the section of the draft that states "disposal of seized property after June 8, 2005, when the Law on Seized Property Reporting and Recording was enacted shall be considered as "mala fide" on the part of the buyer and the seller, so that they shall be liable for losses sustained." This means that property acquired and sold before June 2005 (i.e. nationalized property during communism and cheaply sold property during the Milosevic period) should be considered as good faith disposal. However, property sold on the open market through the privatization process after June 2005 should be considered mala fide disposal. In the mala fide disposal, either the government or the new buyer will be responsible for compensating the original landowner. It is unclear as to who would make this determination. Rajna Andric, Director of the Deposit Insurance Agency, and Luka Andric, State Secretary for Privatization at the Ministry for Economy and Regional

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Development said that the law would be retroactive to include bankruptcy and privatization cases. Such cases would be revisited to determine whether the buyer or the state will return or compensate the original landowners. Djordje Vukotic from the Secretariat of the Council for Regulatory Reform argued that the

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Serbia's mala fide clauses in bankruptcy and privatization cases would not hold up in the European Court of Human Rights in Strasburg.

¶15. Parivodic explained that any sale after June 8, 2005, should be considered as mala fide on the part of the buyer and the seller because the Law on Seized Property Reporting gave legal assurance that a restitution law would be adopted in the future. He also expressed disappointment that the government did not adopt a law that prohibited selling seized property. He added that there were two phases of privatization and two solutions for restitution. According to the 2001 Privatization Law, the government assumes the responsibility for compensating original landowners for property sold through the privatization process because the law explicitly mandates that 5 percent of privatization revenues be set aside for restitution claims. In addition, since 2004, privatization sales contracts stipulate that the buyer accepted responsibility for and risk of future restitution claims. (Note: Privatization of nationalized property in Serbia is ongoing as no court can technically ban the sale of nationalized property since no law on restitution exists at this time. The privatization of socially-owned property is expected to conclude by the end of 2008. End Note.)

¶16. The Serbian government would like to move forward with restitution, but there is no consensus on the right approach. There is division, not only between political parties, but within parties as well. Dusan Rakitic, Harvard Club and Democratic Party (DS) member, told econoff on November 23, that his party is divided on the issue. There are members of DS, together with Rakitic, who support Parivodic's restitution in-kind concept, but there are others, like Professor Dragor Hiber, who support financially compensating original landowners. The latter is in line with the recently released proposed draft law on property rights, which Hiber helped author.

Comment

¶17. Restitution is necessary for political and economic democratization in Serbia. Clear title and land ownership is a key factor in attracting additional foreign investment and to economic growth. The Ministry of Finance's effort to solicit stakeholder input was important in clarifying the concerns of different parties and increasing public participation. It is now up to the government to weigh the different interests and send a draft law to parliament.

The type of restitution law that emerges could result in a shift in economic, and perhaps, political power in the future. If restitution in-kind is adopted, valuable land would return to the former middle and upper classes of pre-communist Serbia who could bolster their economic and political influence. If land is given to those who own buildings on the land, and not the original landowners, then tycoons, friends of the Milosevic regime, and those who bought apartments for 100 Deutsch Marks as a part of Milosevic's election strategy, would benefit most from the law. Given the interests at stake and divisions about the best solution; it is unlikely the government will pass a law before local elections, which are now expected in May 2008. End Comment.

PEDERSON